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## VIA HAND DELIVERY

William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

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MAY 31 1995

FEDERAL COMMUNICATIONS COMMISSION

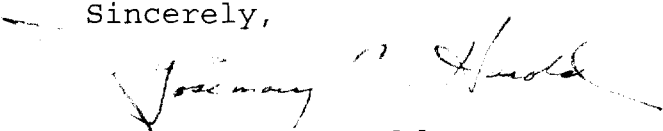
Re: MM Docket No. 95-31  
Reexamination of the Comparative  
Standards for New Noncommercial  
Educational Applicants

Dear Mr. Caton:

Transmitted herewith on behalf of National Religious Broadcasters is an original and four copies of its Reply Comments in the above-referenced proceeding.

If there are any questions concerning this matter, please contact the undersigned.

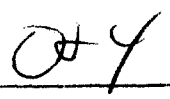
Sincerely,

  
Rosemary C. Harold

Enclosures

KM:rwb

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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In the Matter of

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Reexamination of the Comparative  
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FEDERAL COMMUNICATIONS COMMISSION

**REPLY COMMENTS OF NATIONAL RELIGIOUS BROADCASTERS**

**NATIONAL RELIGIOUS BROADCASTERS**

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May 31, 1995

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## **SUMMARY**

The Commission is reexamining the comparative standards for new noncommercial educational applicants. National Religious Broadcasters ("NRB") opposes any attempts to alter the standards for awarding educational licenses to incorporate criteria that could be used to limit the licensing of broadcast facilities to religious organizations.

In the past, despite the Commission's clear intent that religious applicants not be disqualified from the licensing process, religious broadcasters have found it more difficult than their secular counterparts to obtain broadcast licenses. This disparate treatment has heightened NRB's fear that adopting overly vague standards could result in more of the same. In addition, NRB asserts that if such standards are adopted, they may not withstand judicial scrutiny under either a free expression or First Amendment analysis. Thus, NRB urges the Commission to reject the proposed standards as overly vague, susceptible to manipulation against religious applicants and possibly unconstitutional.

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In the Matter of ) MM Docket No. 95-31  
)  
Reexamination of the Comparative )  
Standards for New Noncommercial )  
Educational Applicants )

To: The Commission

**REPLY COMMENTS OF NATIONAL RELIGIOUS BROADCASTERS**

**I. Introduction and Background**

National Religious Broadcasters ("NRB") hereby files its reply comments in response to the Federal Communications Commission's ("FCC" or "Commission") Notice of Proposed Rulemaking in the above-captioned proceeding, released March 17, 1995 ("NPRM"). NRB strongly objects to the Commission's proposal to modify the criteria currently used to select among competing applicants for new Non-Commercial Educational ("NCE") broadcast facilities. In the past, similar criteria have been used to reduce the ability of religious broadcasters to utilize NCE frequencies. NRB urges the Commission to reject the current proposal to employ such criteria.

NRB is a national association of radio and television broadcasters and programmers whose purpose is to "foster and encourage the broadcasting of religious programs." National Religious Broadcasters, Directory of Religious Broadcasting, at 14 (1992-93). Currently, there are more than 1,328 United States radio stations broadcasting full time religious programs.<sup>1</sup>

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<sup>1</sup> "Lawyers Buy Cleveland Radio Station, Switch to All-Catholic Programming," The Washington Post, B-7, (April 29, 1995).

Over the last twenty years, many of these stations -- and even more of their audience members -- have been concerned about various proposals advanced before the FCC that could limit the access of religious broadcasters to the airwaves.<sup>2</sup> The NRB has been in the forefront of a number of regulatory battles that involved issues raising such concerns. In the current proceedings, NRB opposes any attempts to alter the standards for awarding NCE licenses to incorporate the same criteria that have been proposed in the past to limit the licensing of broadcast facilities to religious organizations.

In taking this position, NRB is not asking for special treatment. To the contrary, NRB members seek only to maintain the ability to broadcast their diverse educational message, serving an audience that would otherwise remain disenfranchised. In light of the serious prospect that the proposed criteria could be used to disadvantage religious broadcasters, NRB urges the Commission to reject the proposal and continue to use the existing standard for the licensing of NCE facilities.

II. Religious Broadcasters' Past Licensing Experiences, Along with the Approach Taken to Religious Programming Under the "Education" Definition Support NRB's Concern That the Proposed Criteria Could Disfavor Religious Broadcasters.

To fully appreciate NRB's concern regarding the Commission's current proposal, it is necessary to understand the context in which it has developed. Over the past three decades,

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<sup>2</sup> Since 1975, more than 20 million letters have been received by the Commission objecting to the Commission's consideration of banning religious broadcasting in the educational band. "Ruby-Oswald Reenactment Results in Shot in Arm," Star Tribune, February 25, 1993. This overwhelming response by supporters of religious broadcasting underscores the vital service to listeners and viewers that these licensees provide.

various branches of government have struggled with the appropriate balance to be maintained with regard to public accommodation of religious speech and expression.

The FCC and its professional staff have not been immune from these difficulties. For many years, the Commission acted on educational licensing matters on an ad-hoc basis only. This approach sometimes resulted in unequal treatment of religious broadcasters is opposed to secular broadcasters. Although the Commission has usually effectively guarded against this syndrome, this problem of disparate treatment has repeatedly returned. For example, the educational aspects of religious programming are still devalued by exclusion from categorization as general education. Thus, because of the recurrence of unequal treatment of religious broadcasters, as detailed in the following sections, NRB opposes any criteria which would enhance agency discretion so as to significantly increase the potential for discriminatory treatment of religious broadcasters.

A. *The Disparate Treatment Experienced by Religious Broadcasters in the Educational Licensing Process Counsels Against Criteria further Empowering Bureaucrats to Exercise Their Discretion.*

To fully appreciate the possible ramifications of the proposed criteria, one must understand how similar "community-based" standards have resulted in limiting religious broadcasting. Licensing in the educational portion of the FM band provides a case in point. This part of the spectrum has been set aside by the Commission to foster non-profit, non-commercial educational broadcasting. 47 C.F.R. § 73.501(a). The Commission's rules generally define the types of persons or entities who are eligible to apply for a non-commercial, educational broadcast station. Such an educational broadcast station will only be licensed to "a

nonprofit educational organization," which has demonstrated that it "will be used for the advancement of an educational program." 47 C.F.R. § 73.503(a).

The Commission's policies implementing these requirements were first developed on an ad-hoc basis. This ad-hoc approach often allowed bureaucratic barriers to be created for religious applications that were not faced by secular organizations.<sup>3</sup> Initially, many religious applications for non-commercial, educational channels were rejected summarily because these groups were considered to be insufficiently qualified.<sup>4</sup> One Commissioner later detailed this early disparate treatment of religious broadcasters, concluding that

[T]he generous and liberal qualification standards which have been afforded secular educational institutions and "public" radio organizations have not been extended to entities which specialize in religious teaching. In the case of the latter entities, the Commission has scrutinized closely questions of accreditation and of what percentage of the broadcast week is devoted to "educational" broadcasts. . . . In these cases it was stated, without explanation, that groups which were primarily religious in their purpose could not qualify as "educational organizations."

Moody Bible Institute, 66 F.C.C. 2d 162 (1977) (concurring opinion of Commissioner White).

The Commission first expressly addressed the issue of religious broadcasting in the educational context in Bible Moravian Church, Inc., 28 FCC 2d 1 (1971). In that case, the Broadcast Bureau had rejected the Bible Moravian Church's application for an educational license on the grounds that the applicant was a religious organization and, as such, was ineligible to hold a requested authorization. In upholding the Broadcast Bureau's rejection, the Commission

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<sup>3</sup> Ashton Hardy and Lawrence W. Secrest, III, "Religious Freedom and the Federal Communications Commission," 16 Valparaiso University Law Review 74-75 (1981).

<sup>4</sup> See, e.g., Keswick Foundation, Inc., 26 FCC 2d 1025 (1970); and Christ Church Foundation, Inc., 13 FCC 2d 987 (1968).



recognized that organizations with religious purposes could qualify as non-commercial educational licensees if the primary thrust of their activity was educational. Although rejecting the church's argument that education was the essence of religion, the Commission did state that it should look at the application as a whole to determine the applicant's essential purpose. The Commission concluded that the purpose of Bible Moravian Church's proposed station was primarily worship and not education. Accordingly, it rejected the application.

The Commission was forced to address the issue of religious broadcast applications again in 1974, when two individuals -- Jeremy Lansman and Lorenzo Milam -- petitioned the Commission to freeze all broadcast applications by religious, Christian, and other sectarian applicants.<sup>5</sup> Their petition challenged the Commission's licensing of any religious organization in the educational reserved band, arguing that such licenses would violate the First Amendment's ban on establishing religion. The Commission rejected the petition in August 1975, emphasizing its position of neutrality toward religious applicants. Moreover, the Commission specifically criticized the petition's proposal to disqualify all religiously affiliated organizations and the petition's unsubstantiated hostility toward religious broadcasters. Finally, the Commission reiterated its policy, established in Bible Moravian Church, of distinguishing between an applicant's primary and secondary purpose.

Although the Commission formally rejected the Lansman and Milam petition, it continued to employ an ad-hoc approach to processing religious broadcasting applications. Despite its earlier decisions supporting religious broadcasters, this ad-hoc approach resulted in Commission action inhospitable to religious applications. In 1977, the Commission again addressed the issue

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<sup>5</sup> Petition for Rulemaking, No. RM-2493 (filed December 1974).

of religious applications for non-commercial educational channels. See Moody Bible Institute, 66 F.C.C. 2d 162 (1977). In Moody Bible, the Broadcast Bureau had opposed an application on the grounds that the operation would be religious rather than educational in nature. In a terse two-sentence opinion, the Commission rejected the Bureau's recommendation, finding instead that the applicant was qualified to operate a non-commercial educational FM broadcast stations, and that the application should be granted.

In the accompanying concurring opinions, the Commissioners expressed a clear concern regarding the staff's disparate treatment of religious broadcast applications. Chairman Wiley made it clear that the Commission should operate as an even plane with respect to religious and non-religious organizations.

[I]n determining whether a grant is appropriate, religious organizations must be judged on the same basis as non-religious organizations. Unfortunately, based on past cases, it is not readily apparent that all organizations . . . have been so judged.<sup>6</sup>

Commissioner White's concurrence went even further, pointing to specific instances of discrimination against religious broadcasting. First, Commissioner White's concurrence detailed the extent to which the Commission's staff had discriminated against religious applicants in the evaluation of programming. Commissioner White objected to the staff's efforts to determine the religious nature of a broadcaster's programming, arguing that such an inquiry involved the Commission in the subjective evaluation of program content. As evidence of the staff's actions, she attached Moody's application with the staff's handwritten notes evaluating the extent of religious programming, and staff working papers counting the number of religious minutes.

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<sup>6</sup> Moody Bible Institute, (66 FCC 2d at 163 Concurring opinion of Commissioner Wiley); see also, Hardy and Secrest at 79.

Objecting to such "second guessing" of a broadcast applicant's own evaluation of his or her programming, Commissioner White concluded:

One can readily discern the morass into which we sink when the process leaves us faced with deciding whether Handel's Messiah, Verdi's Requiem, J.S. Bach's St. John Passion, C.P.E. Bach's Magnificat in D, or recordings of Gregorian chants constitute "religious music," for the purpose of deciding that a station is too religious to be educational.

Moody Bible, 66 FCC 2d at 165 n. 4 (concurring opinion of Commissioner White).

Commissioner White also concluded that the requirement that educational institutions operate a school had only been applied against religious broadcasters.

The application of the local school requirement solely to religious educational organizations is clearly discriminatory. It adds a burden to "religious" applicants which other applicants need not meet. The Commission has granted several licenses to the Pacifica Foundation which maintains no school at all, much less one in each community of license.

Id. at 168 (concurring opinion of Commissioner White). Such a one-sided application of this requirement clearly disfavored religious broadcasters.<sup>7</sup>

Following the Moody Bible decision, the Commission issued a Notice of Inquiry to further clarify the standards for noncommercial educational applications.<sup>8</sup> As a part of that Notice of Inquiry, the Commission established processing standards for use by the staff in determining eligibility requirements for reserved frequencies. At least in part to prevent future

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<sup>7</sup> See also, Hardy and Secrest, at 82-83 ("Religious organizations applying for educational reserved channels have often been subject to an additional requirement of demonstrating that they operate or are affiliated with a school or other educational institution in the community which they propose to serve. The application of this 'school in the city' standard appears to be much less strict where nonreligious applicants are involved.").

<sup>8</sup> FCC eligibility for non-commercial educational FM TV broadcast station licenses, 43 Fed. Reg. 30,842 (1978) [hereinafter Notice of Inquiry].

discriminatory treatment of religious applicants, the Commission declared that institutional applicants may qualify "regardless of whether the school and its courses of instruction are religiously oriented or secular." Id. at 30844. Moreover, the Commission established that religious programming could qualify as educational and that the FCC's staff should defer to the broadcast applicants' own assessment.

In determining whether a program may properly be categorized as "instructional" or "general educational," we will not disqualify any program simply because the subject matter of the teaching or instruction is religious in nature. While not all religious programs are educational in nature, it is clear that those programs which involve the teaching of matters relating to religion would qualify. . . . As in all matters relating to programming, we will defer to the judgment of the broadcaster unless his categorization appears to be arbitrary or unreasonable.

Id. at 30844-45.

Despite the clear mandate from Commissioners that religious applicants not be disqualified from the licensing process, the neutrality directive was not uniformly followed. The opinion in Way of the Cross held that:

Over the years, the Commission has articulated the principle that organizations which are primarily religious in nature, even though they have some educational aspects, will not be allowed to operate on channels for reserved educational use.

Way of the Cross, 58 R.R.2d 455, 459 n. 8 (released June 4, 1985). The Mass Media Bureau's conclusion directly contradicts the Commission's published processing standards. While this statement was overturned by the Commission, the fact that the Mass Media Bureau believed that

the Commission's policy was summarily to reject religious broadcast applications is indicative of the unequal treatment from which religious broadcasters still suffer.

While the Commission frequently has stated its intent to remain neutral toward religion, application of its policies have resulted in sharp differences in the treatment of religious and secular applicants.<sup>9</sup> It is this history of past unequal treatment that gives rise to NRB's fear that increasing agency discretion could result in diminishing equal and neutral treatment of religious speakers.

B. *Religious Programming Has Been Erroneously Excluded From the Definition of "Education" in the Licensing Process.*

NRB has objected to past attempts to diminish the value of religious programming by disqualifying it from a full "educational credit." Despite processing guidelines stating that such programming may be "properly considered both instructional and religious or both general educational and religious,"<sup>10</sup> the applicants continue to be rejected on the basis that much of their religious broadcasting fails to be sufficiently "educational" in nature. For example, despite the applicant's statement in Way of the Cross that its "main purpose was to reach and teach people about the Gospel," the Mass Media Bureau recommended -- and the Commission agreed -- that the applicant had failed to identify any programming which could fall under the definition of "general educational." Way of the Cross, 58 R.R.2d at 460, ¶ 14.

This apparent resistance to the idea that religious broadcasting can be a form of education is particularly perplexing, given that Black's Law Dictionary explicitly defines education as "...

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<sup>9</sup> Hardy and Secrest at 82.

<sup>10</sup> Notice of Inquiry, at 30845.

not merely the instruction received in school or college, but the whole course of training: moral, religious, vocational, intellectual, and physical." Black's Law Dictionary Sixth Edition (1990) (emphasis added).

Decisions like Way of the Cross, which deny the value of religious education and impose differing standards on religious broadcasters, justify NRB's concern that these new criteria in the comparative hearing process could result in denying religious broadcasters their eligibility for licenses. Thus, NRB supports station KSBJ, which objects to the proposed standards because they will further rely on subjective assessments of the value of one form of education over another.

There should not be a preference of one form of education over another. Whether it is cultural, religious, historical, [or] political . . . should be a consideration and not a determining factor. Who is to say what "type" of educational approach provides a community with another voice.

KSBJ Comments, at 2.<sup>11</sup>

Religious programming is often -- if not always -- primarily educational. As such, it should be treated as fully competitive with secular applicants in the reserved band. NRB objects to the adoption of additional vague criteria which could be used to justify the further exclusion of religious programming.

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<sup>11</sup> See also Moody Bible, 66 FCC 2d at 167 n. 7 (concurring opinion of Commissioner White) ("Indeed, Moody's involvement in formal education is so extensive as to be positively overwhelming when compared to many of today's so-called 'public' radio stations.").

III. The Eligibility Criteria Proposed by National Public Radio and Being Considered by the Commission Would Permit Discrimination Against Religious Broadcasters.

Under current practice, when two applicants for non-commercial stations apply for mutually exclusive frequencies, the Commission holds a comparative hearing, inquiring into "the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of their respective applicants." New York University, 10 RR2d 215, 217-18 (1967). The Commission also considers "other factors" that may demonstrate whether one applicant will provide a superior broadcast service. Id. These mutually exclusive applications are evaluated under a three-prong inquiry. The Commission tries to determine: 1) which applicant will best integrate the operation of the proposed station into its overall educational and cultural objectives; 2) the manner in which the proposed operation of the competing applicants will meet the needs of the community to be served; and 3) whether other factors in the record demonstrate that one applicant will provide a superior non-commercial broadcast service. Seattle Public Schools, 4 FCC Rcd 625 (Jan. 19, 1989).

The FCC's policy is not to prefer secular applicants over religious broadcasters. While the Commission may recognize that one applicant's purpose seems somewhat more secular or that another's aims are rooted in the promulgation of its sectarian ministry, the FCC has recently held that these circumstances provide no basis for preferring one candidate over another. Real Life Educational Foundation of Baton Rouge, Inc., 6 FCC Rcd 2577 (May 14, 1991) (Commission held that neither of two competing non-commercial FM applicants -- one secular and one sectarian -- was entitled to comparative preference on that basis.)

In the NPRM under review, the Commission tentatively concluded that its present standard is too "vague" and that it should be eliminated in favor of a modified version of the point system proposed for commercial applicants. NPRM, at ¶ 4. Focusing on the suggestions of NPR, the Commission now asks whether it should adopt standards which "favor applicants with objectives that are directed outwardly to the... listening community, and not exclusively to the licensee itself." NPRM at ¶ 8, 11. In addition, the Commission asks whether it should favor applicants with "a governing board that is broadly representative of the community to be served." Id.<sup>12</sup> Finally, because the FCC believes the existing comparative standard is vague and difficult to apply, it announced that it has frozen the processing of NCE-FM applications.

At first glance, these criteria may not seem threatening to religious broadcasters. As discussed above, however, NRB is concerned with the past use of substantially similar criteria in a way that denied religious broadcasters the opportunity to deliver their message, and by the potential use of the proffered criteria for the same purpose. In that context, NRB objects to the

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<sup>12</sup> To a lesser extent, the FCC has also focused on a proposal by the National Federation of Community Broadcasters ("NFCB"), which advocates a point system based on the following factors: diversification (3 points); minority control (3 points); spectrum efficiency (a coverage comparison) (3 points); local program origination (2 points); local residence of principals (2 points); and finders preference (only as a tie breaker) (1 point). NPRM at ¶ 9.



proposed criteria as being overly subjective and biased against religious broadcasters and as significantly heightening the potential for unequal application in future licensing cases.

A. *The "Broadly Representative" Governing Board Standard Is Overly Vague and Has Already Been Interpreted to Exclude Boards Made Up Primarily of Religious Community Leaders.*

NRB objects to the Commission's proposal to consider the "representativeness" of an applicant's governing board. First, as suggested by Montgomery Christian Educational Radio and other commentors,<sup>13</sup> this standard is overly vague and unworkable. By broadly representative of the community, does the Commission mean ethnically, religiously, culturally, or some other type of representation such as diversity of viewpoint? Moreover, which of these criteria should take precedence over another? Without further direction, this standard will lead to widely divergent interpretations of "representative" and will necessitate overly subjective decisions by the Commission or its staff to resolve these conflicts. Given the past interpretation of regulations which might restrict religious applicants, NRB objects to any vague standard which would allow a subjective interpretation of diversity to become a determinative factor in the availability of a license.

In addition, the Commission has already interpreted an analogous community-based standard to exclude religious boards as insufficiently "representative." With respect to reserved educational TV channels, the Commission now requires that applicants submit evidence that their governing boards broadly represent the educational, cultural, and civic groups in their

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<sup>13</sup> Comments of Montgomery Christian Educational Radio, Inc., at ¶ 5. See also, Comments of the Moody Bible Institute of Chicago, at ¶ 5; Comments of Bible Broadcasting Network, at ¶ 2; Comments of American Family Radio, at 4-5; and Comments of Jimmy Swaggart Ministries, Inc..

communities. In Way of the Cross, a religious applicant demonstrated that all of its officers and members of its corporate board had come from varying backgrounds and denominations, and that each had been active in various civic programs in the community.<sup>14</sup> The Commission, however, rejected the idea that this religious board could represent the broader community. Noting that "all the trustees share a common profession" and that several trustees lived outside the geographic area, the Commission concluded that the applicant had failed to establish that its trustees broadly represented the cultural and civic interests of the community at large. Id. at ¶ 13.

Similarly, NPR -- which originated this "broadly representative of the community" standard -- does not expressly include religious diversity as a factor which qualifies for consideration. NPR specifically advocates providing an applicant credit for integration into the community if its board members maintain "membership or participation in the local school board, local community affairs, outreach program, local museums, symphony orchestras, art galleries, musical groups and other local cultural organizations." Joint Comments of the Association of America's Public Television Stations and National Public Radio, at 10 ("NPR's Comments") Thus, under NPR's proposal, a board member's participation in church activities and other religiously affiliated organizations may not qualify for credit under the integration into the community standard.

The Commission's proposal to consider the "representativeness" of the applicant's board is unmanageable. NRB objects to enshrining any further discretion in the rules which could

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<sup>14</sup> Way of the Cross, 58 RR2d at 458, ¶ 7 (Released June 4, 1985) (FCC upholds Mass Media Bureau's action dismissing Way of the Cross's applications for non-commercial educational television stations in Utah and Texas.)

result in discrimination against religious broadcasters.<sup>15</sup> Moreover, the Commission's current treatment of board representativeness in the NCE television setting, coupled with the NPR proposal to exclude religious involvement as a sufficiently community-based activity for comparative purposes, simply heightens NRB's concern about the future treatment of religious broadcast applicants.

B. *The Proposal to Favor Applicants With Objectives that are "Directed Outwardly to the Listening Community and Not Exclusively to the Licensee Itself" Is Vague and Could Result in Unfair Treatment of Religious Applicants.*

NRB agrees with American Family Radio and others that adopting a standard which favors applicants with objectives that are directed outwardly, as opposed to being directed at the licensee itself, is ambiguous at best and would be subject to challenge as overly vague under Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993).<sup>16</sup> As the Moody Bible Institute asks, what possible evidence could an applicant proffer to demonstrate that its objectives were directed more "outwardly" than a competing applicant? Again, the proposed criteria simply increase the possibility of unfair treatment of religious noticed or irremediable discrimination.

IV. Application of the FCC's Proposed Comparative Criteria Could Violate NRB's Rights Under the First Amendment and the Religious Freedom Restoration Act

When developing and applying its regulations in furtherance of the public interest, the Commission must take into account constitutional considerations. Meredith Corp. v. FCC, 809

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<sup>15</sup> See, e.g., Keswick Foundation, Inc., 26 FCC 2d 1025 (1970); and Christ Church Foundation, Inc., 13 FCC 2d 987 (1968).

<sup>16</sup> Comments of American Family Radio, at 3-4; See also, Comments of the Moody Bible Institute of Chicago, at ¶ 4; Comments of Bible Broadcasting Network, at ¶ 1; and Comments of Montgomery Christian Educational Radio, Inc., at ¶ 4.

F.2d 863, 873 (D.C. Cir. 1987). The failure of the FCC to adequately consider a constitutional claim, especially a First Amendment challenge, is the "very paradigm of arbitrary and capricious administrative action." Id. at 874. The criteria proposed by the Commission raise substantial constitutional concerns under both a free exercise and a free speech analysis.

NRB recognizes that individual denials under an objective non-discriminatory standard are not constitutional violations per se. King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974). However, the adoption of a facially neutral standard which experience tells us could well have the effect of systematically excluding a protected class of applicants will not withstand constitutional scrutiny.

A. *Application of the Proposed Criteria Could Restrict Religious Broadcasting in Violation of the Religious Freedom Restoration Act.*

When the government is distributing a benefit (in this case spectrum), it has the obligation to do so in a manner which does not penalize any individual's free exercise of his religious beliefs. See Board of Educ. v. Mergens, 496 U.S. 226, 248 (1990). The source of this duty is both constitutional and statutory. In 1993, Congress responded to recent court decisions limiting the review of governmental action that burdens an individual's free exercise of religion by enacting the Religious Freedom Restoration Act. 42 U.S.C. § 2000bb. The Act established that the Government may only burden a person's exercise of religion if it successfully demonstrates: (1) that the regulation is based on a compelling governmental interest; and (2) that the regulation is the least restrictive means of furthering that compelling interest.

As proposed, the application of the Commission's ostensibly neutral criteria could penalize religious broadcasters who are actively engaged in exercising their faith through their

educational efforts. If their efforts were diminished by the Commission's proposal, the Religious Freedom Restoration Act would be implicated. This is precisely the type of situation -- a facially neutral regulation, which could well impinge upon the free exercise of religion -- that the Act was designed to address. See, e.g., Hearing Before the Committee on the Judiciary, 102 Congress, 2nd Session (S.2969), U.S. Senate, Sept. 18, 1992 at 71 (Testimony of Professor Douglas Laycock) ("formally neutral laws have repeatedly been the instruments of religious persecution, even in America").<sup>17</sup> In fact, one of the examples cited to demonstrate the need for the Act was the hostile "zoning out" of churches from neighborhoods. Id. at 74-75. Analogously, the Commission's proposed criteria could be applied so as to push the religious broadcasters out of their "electronic churches." If that were to occur, a religious broadcaster would be able to invoke the compelling interest standard reestablished by the Religious Freedom Restoration Act to challenge a regulation which -- as applied -- restricts his free exercise rights.<sup>18</sup> To justify the proposed criteria, the FCC would then need to establish a compelling governmental interest and demonstrate that these criteria were the least restrictive means of furthering that interest. The NRB seriously doubts the FCC would be able to meet such a challenge.

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<sup>17</sup> The Religious Freedom Restoration Act (S. 578) was enacted by the 103d Congress, but substantially similar legislation was introduced in the 101st (S. 3254) and 102d (S. 2969) Congress. The Act's legislative history can actually be found in hearings held on S. 2969 in 1992. See also, Pierce v. Society of Sisters, 268 U.S. 510 (1925) (invalidating facially neutral law closing all Catholic schools).

<sup>18</sup> See, e.g., Sherbert v. Verner, 374 U.S. 398 (1963) (Supreme Court ruled in favor of a Seventh Day Adventist who had lost her state unemployment compensation for refusing to work on Saturday.)

B. *The Proposed Criteria Could Result in Restriction of Religious Broadcast Rights in Violation of the First Amendment.*

The FCC's proposed criteria could also diminish religious applicants' free speech rights. If the FCC were to apply the proposed criteria in a discriminatory manner, it would be a clear violation of the First Amendment. As discussed above, the proposed criteria have been used to examine an applicant's programming, differentiating between religious and educational speech. As previously indicated, NRB rejects this false distinction. If the Commission persists in differentiating between religious and non-religious speech, however, it will need a compelling interest and a narrowly drawn regulation to justify such a content-based restriction. See Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987) (to justify differential treatment based on the content of the speech involved, "the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end."). The proposed comparative criteria are not necessary to serve any compelling interest and are not narrowly drawn to further such an interest. Neither the Commission nor any commentator has presented a sufficiently compelling state interest to justify such a broad restriction.

In addition, entrusting public officials with wide latitude to make content-based distinctions provides a separate basis for unconstitutionality. The Supreme Court has recognized that empowering government officials with unbridled discretion may be unconstitutional, as it enables officials to censor certain viewpoints.

In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office . . .

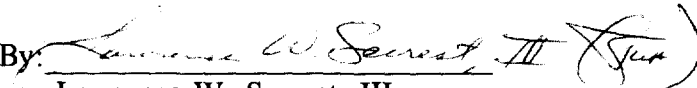
City of Lakewood v. Plain Dealer, 486 U.S. 750, 764 (1988) (Quoting Freedman v. Maryland, 380 U.S. 51 (1965)). Here, the proposed criteria would empower Commission bureaucrats with untrammelled authority to permit or deny applications with no objective standard. Particularly in light of the staff's exhibited bias, such discretion could be subject to challenge.

V. Conclusion

The disparate treatment experienced by religious broadcasters in the past compels NRB to object to any proposal which could result in limiting religious applications. The criteria proposed by the Commission are vague and thus could easily disfavor religious broadcast applicants. These criteria might not withstand judicial scrutiny under the Religious Freedom Restoration Act. Moreover, giving empowering government officials wide latitude to make content-based distinctions may not withstand scrutiny under First Amendment. For all of these reasons, NRB urges the Commission to reject the proposed criteria.

Respectfully submitted,

NATIONAL RELIGIOUS BROADCASTERS

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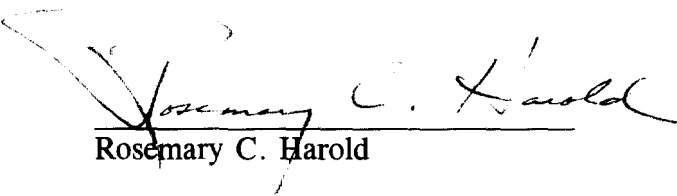
Its Attorneys

May 31, 1995

CERTIFICATE OF SERVICE

I, Rosemary C. Harold, certify that the original and five copies of the foregoing "REPLY COMMENTS OF THE NATIONAL RELIGIOUS BROADCASTERS" were served via hand-delivery on this 31st day of May, 1995, to the following:

William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554



Rosemary C. Harold